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NOTES

THE STATES, THE SCHOOLS AND THE BIBLE: THE EQUAL ACCESS ACT AND STATE CONSTITUTIONAL LAW

I. INTRODUCTION

The role of religion in society has been an ongoing source of controversy in this country. The controversy is perhaps most apparent, and most intense, when the role of religion in the public schools is considered.¹ The constitutionality of in-class prayer, bible readings, moments of silence, and the display of the Ten Commandments have all been considered by the Supreme Court, and all were found impermissible.²

1. See, e.g., Richard F. Duncan, *Religious Civil Rights in Public High Schools: The Supreme Court Speaks on Equal Access*, 24 IND. L. REV. 111, 111 (1991) (stating that *Board of Education of Westside Community Schools v. Mergens* is a civil rights case which clarifies that religion has a legitimate place in public schools); Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 1 (1986) (discussing the meaning of neutrality and arguing that the Constitution allows properly implemented moments of silence and requires equal access for religious speech); Frank R. Jimenez, Note, *Beyond Mergens: Ensuring Equality of Student Religious Speech Under the Equal Access Act*, 100 YALE L.J. 2149 (1991) (arguing that reference to curriculum is unnecessary in determining whether the Equal Access Act applies).

2. See *Wallace v. Jaffree*, 472 U.S. 38 (1985) (moments of silence in public schools impermissible); *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam) (the Ten Commandments may not be posted on a public school classroom wall); *School Dist. of Abington v. Schempp*, 374 U.S. 203 (1963) (Bible readings in public schools impermissible); *Engel v.*

To some, attempts to maintain a separation of church and state in public schools have been carried to an extreme, resulting in discrimination and hostility toward religious speech, ideas, and expression.³ In recent years, several public school officials have prohibited student-initiated religious speech within the school environment.⁴ While permitting various student-initiated extracurricular groups to meet in empty classrooms, several schools have denied the use of school facilities to students wishing to meet to discuss religious topics.⁵ This has occurred notwithstanding the fact that in 1984 Congress overwhelmingly passed the "Equal Access Act," designed precisely to protect high school students from this sort of exclusion from an otherwise available school forum.⁶

The debate over equal access is not new. It is but one illustration of the inevitable conflict between those provisions of the First Amendment requiring freedom of speech and free exercise of religion, and that which prohibits governmental establishment of religion.⁷ With respect to the 1984 Equal Access Act ("EAA"), it appeared that most of this conflict was resolved in June of 1990 when the Supreme Court in *Board of Education v. Mergens*⁸ held that the EAA did not violate the Establishment Clause. Within fifteen months of this decision, however, a new source of conflict surfaced. In *Garnett v. Renton School District*,⁹ a federal district court in the state of Washington interpreted the language of the EAA to exempt Washington from the Act's requirements by virtue of the stricter prohibition on state establishment of religion found in the Washington State Constitution.¹⁰ Thus, states which had

Vitale, 370 U.S. 421 (1962) (school prayer in public schools impermissible).

3. See, e.g., Duncan, *supra* note 1, at 111-13 (stating that many public school officials have tried to suppress religious expression at their schools and that evidence of bias against religion is clear).

4. See *infra* notes 35-46 and accompanying text.

5. *Id.*

6. 20 U.S.C. § 4071 (1988). See also *infra* notes 46-79 and accompanying text (discussing the Equal Access Act).

7. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. See also JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 17.1 (3d ed. 1986) (discussing the "natural antagonism" between the First Amendment clauses).

8. 496 U.S. 226, (1990). See also *infra* notes 80-116 and accompanying text (discussing the *Mergens* case).

9. 772 F. Supp. 531 (W.D. Wash. 1991).

10. *Id.* See also *infra* notes 115-49 and accompanying text (discussing the *Garnett*

hoped to justify noncompliance with the Act by claiming it violated the Establishment Clause of the Federal Constitution, prior to the decision in *Mergens*, could now follow *Garnett's* lead and look to their state constitutions for an exemption from the Act. Less than one month later, a federal district court in Idaho reached the opposite conclusion on virtually identical facts. In *Hoppock v. Twin Falls School District*,¹¹ the Idaho court determined that the Idaho State Constitution, like that of Washington, prohibited equal access to religious groups.¹² The court concluded, however, that the federal law must prevail.¹³

This note examines the application of the EAA in light of the conflict between the Act and state constitutions and argues that equal access should be granted to religious groups regardless of the requirements of a state constitution. Section II discusses the background of the equal access controversy: early court cases regarding equal access, the enactment of the EAA by Congress, and the 1990 *Mergens* decision by the Supreme Court. Section III examines the district court opinions in *Garnett* and *Hoppock*, setting out more specifically the conflict between federal and state law. Section IV(A) analyzes the students' rights to freedom of speech within the school environment and concludes that equal access is not merely permitted, but *required* by the Federal Constitution. Section IV(B) examines the EAA and concludes that the Act works to preempt contrary state law, and, thus, should prevail over a state constitution. An amendment to the Act is proposed which would make congressional intent to preempt absolutely clear, thereby permanently resolving the disagreement regarding application of the EAA in light of conflicting state law.

II. BACKGROUND

A. Equal Access and the Courts Prior to 1984

The controversy over equal access existed well before the EAA was adopted in 1984. One of the most important decisions considering an equal access policy in the educational context is *Widmar v. Vincent*.¹⁴ In *Widmar*, the plaintiffs were members of a

case).

11. 772 F. Supp. 1160 (D. Idaho 1991).

12. *Id.* at 1164.

13. *Id.*

14. 454 U.S. 263 (1981).

religious student group at the University of Missouri at Kansas City called "Cornerstone".¹⁵ Along with over one hundred other student groups, Cornerstone was registered with the University and met regularly on the campus.¹⁶ In 1977, however, the University informed Cornerstone that it would no longer be permitted to use the school's facilities for its meetings.¹⁷ This decision was based on a University policy which prohibited the use of its buildings "for purposes of religious worship or religious teaching."¹⁸ The regulation explicitly stated that the policy was "required . . . by the Constitution and laws of the State and is not open to any other construction."¹⁹ The district court upheld the regulation, concluding that it was not only permissible but required by the Establishment Clause of the Federal Constitution.²⁰ The Court of Appeals for the Eighth Circuit reversed, finding no compelling justification for the University's content-based restriction on religious speech.²¹ The Supreme Court affirmed.²²

The Supreme Court specifically stated that its conclusion was not based on the students' rights under the Free Exercise Clause, but on their First Amendment rights of free speech and association.²³ The Court noted that the religious worship and discussion in which the student group wished to engage constituted "forms of speech and association protected by the First Amendment."²⁴ Thus, in order to justify its policy, the University would have to demonstrate that the regulation served a compelling state interest and was narrowly drawn to achieve that end.²⁵ The University asserted that the regulation served to maintain the strict separation of church and state required under the Establishment Clauses of both the Federal and Missouri Constitutions.²⁶

15. *Id.* at 265.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 265 n.3.

20. *Chess v. Widmar*, 480 F. Supp. 907 (W.D. Mo. 1979), *rev'd*, 635 F.2d 1310 (8th Cir. 1980), *aff'd sub nom. Widmar v. Vincent*, 454 U.S. 263 (1981).

21. *Chess v. Widmar*, 635 F.2d 1310 (8th Cir. 1980), *aff'd sub nom. Widmar v. Vincent*, 454 U.S. 263 (1981).

22. *Widmar v. Vincent*, 454 U.S. 263, 267 (1981).

23. *Id.* at 273 n.13.

24. *Id.* at 269 (citations omitted).

25. *Id.* at 270.

26. *Id.* at 270-71. The federal Establishment Clause states that "Congress shall make no law respecting an establishment of religion" U.S. CONST. amend. I. The Missou-

First the Court considered whether the Federal Constitution required the University to regulate access to school facilities. While agreeing with the University that compliance with constitutional obligations was a compelling interest,²⁷ the Court determined that an equal access policy would not violate the Federal Establishment Clause according to the three-prong test set forth in *Lemon v. Kurtzman*.²⁸ The *Lemon* test states that a regulation does not violate the Establishment Clause if (1) it serves a secular legislative purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not foster excessive government entanglement with religion.²⁹ The *Widmar* Court quickly disposed of the first and third prongs of the test, noting that both the district and appellate courts found that these prongs were satisfied.³⁰ With respect to the second prong, the Court concluded that a nondiscriminatory policy toward the religious group's speech would benefit religion only incidentally, if at all, and, therefore, such a policy did not violate the Establishment Clause.³¹

The University claimed, however, that it had a compelling interest in complying with the stricter requirements of separation of church and state found in the Missouri Constitution, which would be violated by allowing the student groups to meet in the University's buildings.³² The Court rejected this contention, stating that "the state interest . . . in achieving greater separation of church and State than is already ensured under the . . . Federal Constitution . . . [is not] sufficiently 'compelling' to justify con-

ri Constitution is much more explicit in its provisions requiring separation of church and state, stating in part "[t]hat no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion . . . and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship." MO. CONST. of 1945, art. I, § 7.

27. *Widmar*, 454 U.S. at 271.

28. 403 U.S. 602 (1971).

29. *Id.* at 612-13.

30. *Widmar*, 454 U.S. at 271-72. The lower courts found that a secular purpose was served by providing the students with a forum in which they could exchange ideas, and that "the University does not . . . endorse or promote any of the particular ideas aired" in the forum merely by creating the forum. *Id.* at 271-72 n.10. The courts determined that the "excessive entanglement" test was also met. The University actually risked greater entanglement with religion by excluding such speech, since the regulation required constant monitoring of group meetings to ensure that no religious speech took place. *Id.* at 272 n.11.

31. *Id.* at 274.

32. *Id.* at 275.

tent-based discrimination, against [the students'] religious speech."³³

Following *Widmar*, several courts considered the equal access issue with respect to students of less than college age. The confusion of these courts regarding the applicability of the *Widmar* decision to high school students is evidenced by their conflicting holdings. In *Lubbock Civil Liberties Union v. Lubbock Independent School District*³⁴ the Court of Appeals for the Fifth Circuit concluded that the holding of voluntary religious meetings on school grounds before or after school hours violated the Establishment Clause.³⁵ *Nartowicz v. Clayton County School District*³⁶ upheld a district court order granting a preliminary injunction which prohibited meetings of a "Youth for Christ" group after school hours at a junior high school.³⁷ In *Bender v. Williamsport Area School District*,³⁸ however, the district court determined that permitting a student-initiated prayer club to meet during the regularly scheduled activity period did not violate the Establishment Clause, but, in fact, was required by the Free Speech Clause.³⁹ The Court of Appeals for the Third Circuit,⁴⁰ in a decision subsequently vacated by the Supreme Court on standing grounds,⁴¹ reversed the district court, concluding that the group's meetings would be impermissible.⁴² In *Bell v. Little Axe Independent School District*,⁴³ the Dis-

33. *Id.* at 276.

34. 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983).

35. *Id.* at 1048. The court attempted to distinguish *Widmar* on the grounds that the Lubbock School District had not created a public forum, stating that "[t]he holding of student meetings at a public school does not turn that school into a public forum." *Id.* This "distinction" is rather peculiar since *Widmar* involved a state, not a private university.

36. 736 F.2d 646 (11th Cir. 1984).

37. *Id.* at 649.

38. 563 F. Supp. 697 (M.D. Pa. 1983), *rev'd*, 741 F.2d 538 (3d Cir. 1984), *vacated*, 475 U.S. 534 (1986).

39. *Id.* at 716.

40. *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538 (3d Cir. 1984), *vacated*, 475 U.S. 534 (1986).

41. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986) (vacating the decision of the Third Circuit Court of Appeals based on conclusion that appellant lacked standing to appeal).

42. *Bender*, 741 F.2d at 541. The court acknowledged that the students' free speech rights were implicated. *Id.* at 550. The court, however, balanced these rights against Establishment Clause concerns, which it also felt were implicated, finding that the constitutional interest in avoiding establishment of religion outweighed the "interest in protecting free speech within the context of the activity period." *Id.* at 559.

43. No. Civ-81-620-T (W.D. Okla. Mar. 14, 1983), *aff'd in part and rev'd in part*,

strict Court for the Western District of Oklahoma held that student-initiated prayer meetings were constitutionally permissible after school, but impermissible before school.⁴⁴ This decision was reversed by the Tenth Circuit Court of Appeals, which found that such meetings would violate the Establishment Clause.⁴⁵ These decisions obviously gave little guidance to anyone attempting to discern precisely what schools were required to, permitted to, or prohibited from doing with respect to equal access.

B. The Legislative Solution: The Equal Access Act

The effect of these conflicting court decisions concerned many in Congress. The decisions caused a great deal of confusion among school officials, who reacted by engaging in policies hostile toward religion in an attempt to avoid costly litigation against claims of establishment of religion.⁴⁶ For example, some high school students were prohibited from including religion-related items in the school newspapers.⁴⁷ A student in Minnesota was told to remove a button which the principal understood to convey a religious message.⁴⁸ Students in Boulder, Colorado were instructed that they could not sit together in groups of two or more for the purpose of religious discussion.⁴⁹ While permitting research papers on topics such as ethics and the occult, some teachers prohibited or even ridiculed papers on religious topics.⁵⁰ A fourth grade student in Minnesota was reprimanded for bowing her head in prayer before a

766 F.2d 1391 (10th Cir. 1985).

44. S. REP. NO. 357, 98th Cong., 2d Sess. 7 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2349, 2353 (discussing the district court opinion in *Bell*).

45. *Bell v. Little Axe Indep. Sch. Dist.*, 766 F.2d 1391, 1402-07 (10th Cir. 1985).

46. *See, e.g.*, 130 CONG. REC. S6651 (1984) (statement of Sen. Denton) ("schools have been coerced into [cancelling voluntary student meetings which have a religious content] by the threat of costly lawsuits"); *id.* at H3859-60 (statement of Rep. Coats) ("[the EAA] is needed because local school authorities wishing to avoid legal controversy have dramatically restricted first amendment rights of students"); H.R. REP. NO. 710, 98th Cong., 2d Sess. 4 (1984) (discussing confusion of school officials due to lower federal court decisions); S. REP. NO. 357, *supra* note 44, at 12-15, *reprinted in* 1984 U.S.C.C.A.N. at 2358-61; Robert L. Crewdson, *The Equal Access Act of 1984: Congressional and the Free Speech Limits of the Establishment Clause in Public High Schools*, 16 J.L. & EDUC. 167, 167 (1987) (citing examples of the ways in which "[s]chool attorneys and administrators, under pressure from interest groups wielding new theories of how schools might violate the Establishment Clause, have gone to absurd lengths to avoid lawsuits").

47. S. REP. NO. 357, *supra* note 44, at 16, *reprinted in* 1984 U.S.C.C.A.N. at 2362.

48. *Id.* at 17, *reprinted in* 1984 U.S.C.C.A.N. at 2363 (the button read "How's Your Love Life?").

49. *Id.*

50. *Id.*

meal.⁵¹ These incidents conveyed to students a message of state hostility, rather than neutrality, toward religion.⁵² Finding this message unacceptable,⁵³ Congress took action.

The earliest bill to provide for equal access to student religious groups during non-instructional periods was introduced in September of 1982 by republican Senator Mark Hatfield, an opponent of school-endorsed prayer.⁵⁴ Senator Hatfield's bill never made it to the floor for a vote, but the following year Senator Jeremiah Denton introduced S.1059, an equal access measure similar to Hatfield's version.⁵⁵ The legislation was voted favorably out of the Senate Judiciary Committee, of which Senator Denton was a member, by a vote of twelve to four in September of 1983.⁵⁶ The following April, the House version of the Equal Access Act, H.R. 5345, introduced by Representative Don Bonker, Chairman Carl Perkins of the House Committee on Education and Labor, Representative William Goodling, and Representative Rodney Chandler was voted favorably out of the committee by a vote of thirty to three.⁵⁷ After several revisions, the bill passed in the Senate on June 27, 1984, by a vote of 88 to 11, and in the House on July 25, by a vote of 337 to 77.⁵⁸ On August 11, President Reagan signed the Equal Access Act into law.⁵⁹

The Act was seen as an attempt to resolve the confusion among school administrators created by the conflicting lower court decisions.⁶⁰ The drafters and supporters of the bill felt that the

51. *Id.* at 18, reprinted in 1984 U.S.C.C.A.N. at 2364.

52. *Id.* at 19, reprinted in 1984 U.S.C.C.A.N. at 2365 (discussing student perception of state hostility toward religion).

53. See, e.g., *id.* at 21, reprinted in 1984 U.S.C.C.A.N. at 2367 ("If local authorities could take a truly neutral stance toward religious speech, students would lose the tragic perception that the government is affirmatively hostile to religious expression, a perception that could, in the next generation, lead to the national disaster of intolerance of religion.").

54. RODNEY K. SMITH, PUBLIC PRAYER AND THE CONSTITUTION 280 (1987). See also Crewdson, *supra* note 46, at 170 (discussing the introduction of Senator Hatfield's bill).

55. See SMITH, *supra* note 54, at 280 (discussing the introduction of Senator Hatfield's bill).

56. See S. REP. NO. 357, *supra* note 44, at 4-5, reprinted in 1984 U.S.C.C.A.N. at 2351 (discussing the disposition of Senator Hatfield's bill by the Senate Judiciary Committee).

57. See SMITH, *supra* note 54, at 280-81 (discussing the disposition of the House of Representatives' version of the Equal Access Act).

58. *Id.* at 281.

59. *Id.*

60. See, e.g., H.R. REP. NO. 710, *supra* note 46, at 3 (discussing the confusion of school administrators resulting from the lower court decisions); S. REP. NO. 357, *supra*

denial of equal access to religious groups violated the students' constitutionally protected rights to freedom of speech, free exercise of religion, and free association.⁶¹ Many of the proponents felt that the reasoning of *Widmar* was fully applicable to high school students' religious speech and saw the Act as an expedient way to cut through the conflicts in the lower courts.⁶² The purpose of the Act as reported by the Senate Judiciary Committee was to "clarify and confirm the First Amendment rights of freedom of speech, freedom of association, and free exercise of religion which accrue to public school students who desire voluntarily to exercise those rights" when the school creates a forum for extracurricular activities.⁶³

The substantive requirements of the Act are fairly straightforward: when a school allows noncurriculum student groups to meet, it may not deny a group the right to meet based on the content of the group's speech.⁶⁴ The Act's requirements are triggered when a school receives federal funds and has established a "limited open forum."⁶⁵ Such a forum exists when a school allows "one or more noncurriculum related student groups to meet on school premises during noninstructional time."⁶⁶ The Act provides that such meetings must be "voluntary and student initiated-

note 44, at 13-14, *reprinted in* 1984 U.S.C.C.A.N. at 2359-60 (providing examples which demonstrate the confusion among school administrators).

61. *See, e.g.*, H.R. REP. NO. 710, *supra* note 46, at 6 (stating that Congress should pass equal access legislation in order to fulfill "its duty to uphold the Constitution in dealing with the issue of religious speech in public secondary schools"); S. REP. NO. 357, *supra* note 44, at 12, 14, *reprinted in* 1984 U.S.C.C.A.N. at 2358, 2360 (concluding that students are being denied the rights of freedom of speech and free exercise of religion which should be fully protected by the First Amendment); 130 CONG. REC. S8337 (1984) (statement of Sen. Hatfield) ("[W]here there is an action . . . taken by [school officials] which denies a right that is guaranteed under the Constitution, then the Congress of the United States, I think, has a duty and an obligation to step in and remedy that violated right."); *id.* at H3856 (statement of Rep. Perkins) ("This . . . bill guarantees first amendment rights to the free exercise of religion and to freedom of speech for students in public high schools . . .").

62. *See, e.g.*, H.R. REP. NO. 710, *supra* note 46, at 3 ("Despite *Widmar*, many school administrators across the country are prohibiting voluntary, student-initiated religious speech at the secondary school level."); S. REP. NO. 357, *supra* note 44, at 6-10, *reprinted in* 1984 U.S.C.C.A.N. at 2352-56 (discussing *Widmar* and the belief that its reasoning should apply to students below the college level); 130 CONG. REC. H3856 (1984) (statement of Rep. Perkins) ("We are only trying to get [*Widmar*] to apply to high school students because of so many contradictory lower Federal court decisions . . .").

63. S. REP. NO. 357, *supra* note 44, at 3, *reprinted in* 1984 U.S.C.C.A.N. at 2349.

64. 20 U.S.C. § 4071 (1988).

65. *Id.* § 4071(a).

66. *Id.* § 4071(b).

ed,"⁶⁷ that there can be no school sponsorship of or participation in the meetings by school employees,⁶⁸ and that the meeting may not interfere with the orderly conduct of the school.⁶⁹ Subsection (d) places specific limitations on government control over meetings, providing that nothing in the Act

shall be construed to authorize the United States or any State or political subdivision thereof —

(1) to influence the form or content of any prayer or other religious activity;

(2) to require any person to participate in prayer or other religious activity;

. . .

(5) to sanction meetings that are otherwise unlawful;

. . . or

(7) to abridge the constitutional rights of any person.⁷⁰

Several provisions in the final version of the Act represented compromises designed to allay objections which had been raised during debates in both houses. For example, as originally introduced in the Senate, S.1059 did not limit the equal access requirement to *secondary* schools, but included all public schools receiving federal funds.⁷¹ This concerned some members of Congress who felt that young children were too impressionable to discern the distinction between government support of and neutrality toward religion.⁷² Much of this opposition was satisfied when the Act's application was limited to secondary schools.⁷³

A source of strong opposition to the House version was found

67. *Id.* § 4071(c)(1).

68. *Id.* § 4071(c)(2)-(3).

69. *Id.* § 4071(c)(4).

70. *Id.* § 4071(d).

71. See S. REP. NO. 357, *supra* note 44, at 1, reprinted in 1984 U.S.C.C.A.N. at 2349.

72. See, e.g., H.R. REP. NO. 710, *supra* note 46, at 15 (dissenting views of Rep. Ackerman, Rep. Burton, Rep. Ford and Rep. Simon) (discussing the impressionability of college students versus younger students); S. REP. NO. 357, *supra* note 44, at 43, reprinted in 1984 U.S.C.C.A.N. at 2389 (minority view of Sen. Mathias) (discussing the fact that young children cannot make the distinction between government support of and neutrality towards religion); *id.* at 48, reprinted in 1984 U.S.C.C.A.N. at 2394 (minority view of Sen. Metzenbaum) (discussing the impressionability of high school students versus younger students).

73. See SMITH, *supra* note 54, at 282.

in the nature of the sanction for violations of the Act. Section 2 of H.R. 5345 provided that violations would be met with a denial of federal funds.⁷⁴ The House dissenters noted that the entire school district may be subject to the cut-off of funds even though only one school denied equal access.⁷⁵ As finally adopted, the EAA specifically disavowed the denial of federal funds as a sanction for violations of the Act.⁷⁶ Other compromises and revisions included provisions to protect the rights of nontraditional religious groups by requiring that no minimum size be established,⁷⁷ and to limit the participation or influence of individuals not affiliated with the school.⁷⁸ The final result was an unusually bipartisan effort to protect the First Amendment rights of students in the public schools.⁷⁹

C. *Mergens*: The Supreme Court Speaks on the EAA

In 1990, the Supreme Court spoke for the first time on the merits of the EAA.⁸⁰ *Board of Education v. Mergens*⁸¹ presented the claim of several high school students seeking declaratory and injunctive relief against the school board which refused to allow the students to form a Christian club.⁸² Although approximately thirty student groups met at the school on a voluntary basis, the students interested in forming the religious club were informed that such an organization would violate the Establishment Clause.⁸³

74. See H.R. REP. NO. 710, *supra* note 46, at 9.

75. *Id.* at 16.

76. 20 U.S.C. § 4071(e) (1988).

77. *Id.* § 4071(d)(6). See also SMITH, *supra* note 54, at 284-85 (stating that there is no minimum size requirement in order for the EAA to be applicable).

78. § 4071(c)(5) (stating that "nonschool persons may not direct, conduct, control, or regularly attend activities of student groups"). See also SMITH, *supra* note 54, at 285 (discussing the fact that schools can prevent persons not affiliated with the school from influencing or conducting school groups).

79. See D. Jarrett Arp, Note, *Beyond Mergens: Balancing a Student's Free Speech Right Against the Establishment Clause in Public High School Equal Access Cases*, 32 WM. & MARY L. REV. 127, 139 (1990) (arguing that the impressionability rationale should be abandoned and proposing an evidentiary test that allows for balancing free speech rights against the Establishment Clause).

80. The only EAA case to reach the Supreme Court prior to *Mergens* was *Bender v. Williamsport Area School District*, 475 U.S. 534 (1986). The Court in that case vacated the decision of the Court of Appeals based on the conclusion that the petitioner, a member of the school board, did not have standing to appeal the decision of the district court. *Id.* at 536.

81. 496 U.S. 226 (1990).

82. *Id.* at 233.

83. *Id.* at 232-33. The students wished to meet on the same conditions as the other

The students argued that the school's refusal to allow the group to meet violated the EAA, and additionally, denied them their constitutional rights to freedom of speech, association, and the free exercise of religion.⁸⁴ The school responded by arguing that it was not bound by the terms of the EAA; it did not have the "limited open forum" which triggers the requirements of the Act since all of the clubs meeting at the school were curriculum-related.⁸⁵ Furthermore, the school argued that even if it did fall within the terms of the Act, it nevertheless could deny the Christian club permission to meet because the EAA itself violated the Establishment Clause of the First Amendment.⁸⁶

The district court agreed with the school's contention that it did not have a "limited open forum," and, thus, the Act did not apply.⁸⁷ It also found no merit in the students' constitutional claim.⁸⁸ The Court of Appeals for the Eighth Circuit reversed, concluding that several of the clubs at the school were in fact noncurriculum-related, thus triggering the requirements of the EAA.⁸⁹ The appellate court also rejected the school's contention that the Act violated the Establishment Clause.⁹⁰

The Supreme Court affirmed.⁹¹ First, the Court considered the categorization of various student groups as either curriculum or noncurriculum-related. It found neither the language of the Act nor the legislative history to be helpful in defining the term "noncurriculum related student group."⁹² In light of the Act's

student groups, with the exception that they would not have a faculty sponsor. The school officials informed the students that school policy required that all student clubs have a faculty sponsor. *Id.*

84. *Id.* at 233.

85. *Id.* at 237-43 (discussing the meaning of curriculum-related versus noncurriculum-related activities). Of the thirty clubs meeting at the school, the parties disputed the characterization of ten groups as curriculum-related: Interact (a service club); Chess; Subsurfers (for students interested in scuba diving); National Honor Society; Photography; Welcome to Westside; Future Business Leaders of America; Zonta (the female counterpart to Interact); Student Advisory Board and Student Forum (both student government organizations). *Id.* at 243-44.

86. *Id.* at 247.

87. *Id.* at 233.

88. *Id.* (reasoning that the school did not have the limited public forum found in *Widmar*).

89. *Mergens v. Board of Educ.*, 867 F.2d 1076, 1079 (8th Cir. 1989), *aff'd*, 496 U.S. 226 (1990).

90. *Id.* at 1080.

91. *Board of Educ. v. Mergens*, 496 U.S. 226, 253 (1990).

92. *Id.* at 237.

"broad legislative purpose . . . to address perceived widespread discrimination against religious speech in public schools," however, the Court determined that the term "noncurriculum related student group" should be "interpreted broadly to mean any student group that does not *directly* relate to the body of courses offered by the school."⁹³ Applying this definition, it was "clear that Westside's existing student groups include[d] one or more 'noncurriculum related student groups.'"⁹⁴

Next, the Court analyzed the constitutionality of the EAA under the Establishment Clause.⁹⁵ Six justices agreed that compliance with the EAA did not violate the Establishment Clause.⁹⁶ Chief Justice Rehnquist and Justices White and Blackmun joined in Justice O'Connor's opinion regarding the Establishment Clause issue.⁹⁷ The plurality concluded that the reasoning of *Widmar v. Vincent*,⁹⁸ which found an equal access policy in a state university constitutional under the *Lemon* test,⁹⁹ could be applied with equal force to the EAA.¹⁰⁰ The plurality found that the Act had the secular purpose of "prevent[ing] discrimination against religious and other types of speech"¹⁰¹ thereby satisfying the first prong of the *Lemon* test. The second prong of the test asks whether the primary effect of the law is to advance or inhibit religion.¹⁰² The concern addressed by this inquiry is whether the law will create the impermissible perception of government endorsement of religion.¹⁰³ The plurality held that compliance with the EAA would not create such a perception. It concluded that "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a non-

93. *Id.* at 239.

94. *Id.* at 245 (finding that by the school's own descriptions of the groups, at the very least, Subsurfers and the Chess club were noncurriculum related).

95. *Id.* at 253, 258 (plurality opinion stating that the EAA does not violate the Establishment Clause).

96. The six justices who agreed that the EAA did not violate the Establishment Clause were Chief Justice Rehnquist and Justices O'Connor, White, Blackmun, Kennedy and Scalia.

97. *Mergens*, 496 U.S. at 229, 247-53 (opinion by Justice O'Connor rejecting petitioners' claim that the EAA violates the Establishment Clause).

98. 454 U.S. 263 (1981).

99. *Id.* at 270-75. See also *supra* notes 14-33 and accompanying text.

100. *Mergens*, 496 U.S. at 248.

101. *Id.* at 249.

102. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

103. *Mergens*, 496 U.S. at 249-50.

discriminatory basis.”¹⁰⁴ The plurality distinguished between “government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”¹⁰⁵ The third prong of the test asks whether the law creates a risk of excessive government entanglement with religion.¹⁰⁶ The plurality found that the EAA did not.¹⁰⁷ Although the Act permits the assignment of a monitor to the meeting “for custodial purposes”,¹⁰⁸ it specifically prohibits participation in the meeting by any such faculty monitor or any sort of school sponsorship of the meeting.¹⁰⁹ Furthermore, the plurality was persuaded by the reasoning of *Widmar* that a prohibition on religious speech at school meetings may create a more excessive government entanglement because the school would have to constantly monitor *all* student meetings to ensure that religious speech was not taking place.¹¹⁰

In an opinion concurring in part and concurring in the judgment, Justices Kennedy and Scalia agreed that the EAA did not violate the requirements of the Establishment Clause.¹¹¹ The concurring opinion, however, did not apply the *Lemon* test, but instead used the two-part test set forth by Justice Kennedy in his concurring opinion in *County of Allegheny v. American Civil Liberties Union*.¹¹² Under the *Allegheny* test, a law is consistent with the requirements of the Establishment Clause if it does not result in government coercion to participate in a religious activity or does not directly benefit religion such that it in fact establishes or tends to establish a state religion or religious faith.¹¹³ The concurring Justices found the Act valid since there was nothing to indicate that enforcement of the statute would result in the coercion of students to participate in religious activity, and any benefits conferred on a religious group under the Act would be incidental.¹¹⁴

104. *Id.* at 250 (citations omitted).

105. *Id.*

106. *Lemon*, 403 U.S. at 613.

107. *Mergens*, 496 U.S. at 253.

108. 20 U.S.C. § 4072(2) (1988).

109. *Id.* § 4071(c)(2)-(3).

110. *Mergens*, 496 U.S. at 253. See also *Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981) (agreeing with the court of appeals that prohibiting religious speech at school meetings might create more entanglement).

111. *Mergens*, 496 U.S. at 260.

112. 492 U.S. 573 (1989).

113. *Id.* at 659.

114. *Mergens*, 496 U.S. at 261-62.

In a separate opinion concurring in the judgment, Justices Marshall and Brennan concluded that "the Act as applied to Westside *could* withstand Establishment Clause scrutiny"¹¹⁵ Justice Marshall, however, found it necessary to write separately to emphasize the necessity of the school's taking special efforts to fully disassociate itself from the club's religious speech to avoid any possible appearance of sponsorship or endorsement of the group's goals.¹¹⁶

III. ISSUE

The Supreme Court's decision in *Mergens* by no means settled the equal access controversy. Although *Mergens* put to rest the question of the EAA's constitutionality under the Establishment Clause of the Federal Constitution, a new question has emerged: does the EAA apply to public schools where the state constitution, standing alone, clearly would prohibit equal access because it contains stricter prohibitions on the establishment of religion than does the Federal Constitution? Two recent federal district courts considering this issue have reached different conclusions.

A. *Garnett v. Renton School District*¹¹⁷

Lindbergh High School, located in the Renton School District in the state of Washington, allowed student groups to meet in classrooms during noninstructional time. In 1987, Richard Garnett and other students asked school authorities for permission to use a classroom for meetings of a non-denominational Christian student group prior to morning classes.¹¹⁸ The request was denied because the club was noncurriculum related,¹¹⁹ and, therefore, school authorities believed that allowing such meetings would

115. *Id.* at 263.

116. *Id.* at 263, 267-68. Justice Marshall found *Widmar* distinguishable because the University of Missouri specifically disavowed any endorsement of the opinions of any student organization meeting on the campus. *Id.* at 267. See *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981) (discussing student handbook which stated that the University was not identified with the student organizations). In contrast, Westside "explicitly promote[d] its student clubs 'as a vital part of the total education program [and] as a means of developing citizenship.'" *Mergens*, 496 U.S. at 267.

117. 874 F. 2d. 608 (9th Cir. 1989), *vacated*, 496 U.S. 914 (1990), *on remand*, 772 F. Supp. 531 (W.D. Wash. 1991).

118. *Id.* at 609.

119. The school's stated policy was that only curriculum related student groups would be permitted to meet. The policy specifically stated that the district "does not offer a limited open forum." *Id.* (quoting Renton School District Policy 6470).

violate the Establishment Clause.¹²⁰ The students brought suit in United States District Court seeking a preliminary injunction requiring the school district to allow them to use the classroom. The district court denied the injunction and entered judgment in favor of the school district.¹²¹

The Court of Appeals for the Ninth Circuit affirmed.¹²² The appellate court agreed with the district court's conclusion that the EAA was not applicable. The school did not permit any noncurriculum related student groups to meet and, thus, did not provide the limited open forum required to trigger the Act's requirements.¹²³ Applying the *Lemon* test, the appellate court found that to allow the student group to meet would violate the Establishment Clause.¹²⁴ While conceding that there was arguably a secular purpose for permitting the religious group to meet in the school, the court concluded that such action would have the primary effect of advancing religion and would cause excessive government entanglement with religion.¹²⁵ The court distinguished *Widmar v. Vincent* based on the fact that "[h]igh school students are less mature and more impressionable than university students."¹²⁶ The students petitioned the Supreme Court for a writ of certiorari.

On June 11, 1990, just one week after deciding *Mergens*,¹²⁷ the Supreme Court summarily granted the students' petition for a writ of certiorari, vacated the judgment, and remanded to the court of appeals "for further consideration in light of [the *Mergens* decision]."¹²⁸ The Ninth Circuit Court of Appeals subsequently remanded the case to the District Court for the Western District of

120. *Id.* at 610.

121. *Garnett v. Renton Sch. Dist.*, 675 F. Supp. 1268, 1277 (W.D. Wash. 1987), *aff'd*, 874 F.2d 608 (9th Cir. 1989), *vacated*, 496 U.S. 914 (1990), *on remand*, 772 F. Supp. 531 (W.D. Wash. 1991).

122. *Garnett*, 874 F.2d at 614.

123. *Id.*

124. *Id.* at 610-12 (allowing requested meeting of student religious group violates all three prongs of the *Lemon* test).

125. *Id.* at 610. The court concluded that "[p]ermitting [the group] to meet . . . would impermissibly advance rather than neutrally accommodate religion." *Id.* at 611. Furthermore, excessive entanglement would result since the group would be required to have faculty supervision, and such supervision "could lead to teacher interference with or advocacy of religious activities." *Id.* at 612.

126. *Id.*

127. See *supra* notes 80-116 and accompanying text (discussing the *Mergens* decision).

128. *Garnett v. Renton Sch. Dist.*, 496 U.S. 914 (1990), *on remand*, 772 F. Supp. 531 (W.D. Wash. 1991).

Washington,¹²⁹ the very court which had originally ruled on the merits of the case four years earlier. On August 15, 1991, United States District Court Judge Walter McGovern, who had handed down the initial decision, once again decided that the religious club could not meet in the school on the same terms as the other student groups.¹³⁰

Judge McGovern acknowledged that, under the criteria set forth by *Mergens*, the school had in fact created a "limited open forum" under the meaning of the EAA.¹³¹ Nevertheless, he found the Act inapplicable because "[t]he Washington constitution . . . precludes the Act from requiring the use of school premises by a religious club [and t]he Supremacy Clause of the United States Constitution does not bar the Washington constitution from limiting application of the Act."¹³²

Having determined that the EAA was triggered by the school's creation of a limited open forum, the court then discussed the nonestablishment provisions of the Washington Constitution. First, Article I, Section 11, which addresses religious freedom, states in part that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."¹³³ Second, Article IX, Section 4, which deals with sectarian control of schools, provides that "[a]ll schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."¹³⁴ The court found that, although the EAA did not violate the federal Establishment Clause,¹³⁵ "[t]he Washington Constitution 'require[d] a far stricter separation of church and state than the federal constitution.'"¹³⁶ No "de minimis" violation of these provisions may be tolerated; the prohibition on religious influence or support of schools in Washington is absolute.¹³⁷ Additionally, the use of public school property for the meetings, the use of school

129. See *Garnett v. Renton Sch. Dist.*, 772 F. Supp. 531, 532 (W.D. Wash. 1991).

130. *Id.* at 538.

131. *Id.* at 534.

132. *Id.* at 532-33.

133. WASH. CONST. art. I, § 11.

134. *Id.* art. IX, § 4.

135. See *Board of Educ. v. Mergens*, 496 U.S. 226, 253 (1990) (holding that the EAA does not violate the Establishment Clause). See also *supra* part II.C (discussing the *Mergens* decision).

136. *Garnett*, 772 F. Supp. at 535 (citations omitted).

137. *Id.* at 536.

personnel to supervise the meetings, and the use of bulletin boards or other common areas to advertise the club "are all uses of public personnel or public funds to support religion."¹³⁸ Judge McGovern concluded that even if the benefit to the religious group could only be characterized as "slight," the Washington Constitution would, nonetheless, be violated.¹³⁹ Having found that the Washington Constitution would be violated by adhering to the mandates of the EAA, Judge McGovern held that the Act, by its own terms, did not apply to the Washington schools.¹⁴⁰ In support of this conclusion, Judge McGovern looked to two specific clauses of the Act which provide that the Act should not be construed to authorize any school district "to sanction meetings that are otherwise unlawful . . . [or] to abridge the constitutional rights of any person."¹⁴¹ Thus, it was reasoned, since the Washington Constitution does not permit such meetings, the EAA itself exempted the state of Washington from the Act's requirements.¹⁴²

Next, the court considered whether the Supremacy Clause of the Federal Constitution¹⁴³ nevertheless barred the Washington Constitution from limiting application of the Federal Act. Judge McGovern concluded that it did not.¹⁴⁴ First, he noted that "state courts may interpret state constitutions to be more protective of individual rights than the Federal Constitution."¹⁴⁵ Next, he considered under what circumstances Congress may be found to have preempted state law. Quoting from *Northwest Central Pipeline Corp. v. Kansas Corp. Commission*,¹⁴⁶ Judge McGovern stated:

138. *Id.* (quoting amicus curiae memorandum of the Anti-Defamation League of B'nai B'rith).

139. *Id.* at 537.

140. *Id.*

141. 20 U.S.C. § 4071 (d)(5), (7) (1988).

142. *Garnett*, 772 F. Supp. at 535.

143. The Supremacy Clause states that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

144. *Garnett*, 772 F. Supp. at 537.

145. *Id.* (citations omitted). The opinion does not explain how its interpretation of the Washington State Constitution is *more* protective of individual rights than the Federal Constitution. Presumably, this interpretation of the state constitution shows more deference to Establishment Clause concerns than does the interpretation of the Federal Establishment Clause in *Mergens*. It fails, however, to address any possible concern for individual rights to freedom of speech, freedom of association, and freedom of religion guaranteed by the Federal Constitution which, at least arguably, are greatly infringed by this preference for establishment concerns.

146. 489 U.S. 493, 526 (1989) (holding that Congress did not utilize its power under

Congress has the power under the Supremacy Clause . . . to pre-empt state law. Determining whether it has exercised this power requires that we examine congressional intent. In the absence of explicit statutory language signaling an intent to pre-empt, we infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law . . . or where the state law at issue conflicts with federal law, either because it is impossible to comply with both . . . or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives¹⁴⁷

Judge McGovern concluded that the EAA does not pre-empt state law because there was neither explicit nor inferable congressional intent to do so.¹⁴⁸ Nowhere does the Act explicitly state that it is to supersede contrary state law, but only that it supersedes all inconsistent federal law.¹⁴⁹ Furthermore, referring to the "otherwise unlawful" or "constitutional rights" clauses,¹⁵⁰ Judge McGovern read the plain language of the Act to indicate that "Congress did not legislate so comprehensively as to occupy an entire field of regulation."¹⁵¹ Thus, Judge McGovern concluded, "[t]here is no intent to displace the Washington Constitution."¹⁵²

B. *Hoppock v. Twin Falls School District*¹⁵³

Less than one month after the *Garnett* decision, a case virtually identical on its facts was decided by the United States District Court for the District of Idaho. *Hoppock v. Twin Falls School District* concerned the denial of the request of several ninth grade students attending Robert Stuart Junior High School in Idaho to form a Christian religious club which was to meet at the school during noninstructional time.¹⁵⁴ The parties stipulated that the

the Supremacy Clause to preempt the state regulation and that such regulation was constitutional).

147. *Id.* at 509 (citations omitted).

148. *Garnett*, 772 F. Supp. at 537.

149. 20 U.S.C. § 4074 (1988).

150. *Id.* § 4071(d)(5), (7).

151. *Garnett*, 772 F. Supp. at 537.

152. *Id.* at 538.

153. 772 F. Supp. 1160 (D. Idaho 1991).

154. *Id.* at 1161.

school district maintained a "limited open forum" within the meaning of the EAA and received federal funds.¹⁵⁵ The school district, however, argued that the Idaho Constitution's requirement of a strict separation between church and state prevented it from complying with the provisions of the EAA. Thus, "[t]he only issue [was] whether the Idaho Constitution [took] precedence over the EAA and prohibit[ed] religious clubs from meeting on school property."¹⁵⁶

Although the opinion rebuked Congress for its "encroachment" into state sovereignty and opined that Congress acted "on the edge" of its boundaries in passing the EAA,¹⁵⁷ the court concluded that the federal law must prevail over the conflicting state constitution.¹⁵⁸ The relevant portions of the Idaho Constitution are similar to those at issue in *Garnett*.¹⁵⁹ Article 9, Section 6 of the Idaho State Constitution provides that "[n]o sectarian or religious tenets or doctrines shall ever be taught in the public schools No books, papers, tracts or documents of a political, sectarian or denominational character shall be used or introduced in any schools"¹⁶⁰ Article 9, Section 5 states "[no] school district . . . shall ever make any appropriation, or pay from any public fund or moneys whatever, anything . . . for any sectarian or religious purpose, . . . nor shall any grant or donation of land, money or other personal property ever be made by the state . . . to any church or for any sectarian or religious purpose."¹⁶¹ These clauses had been interpreted by the state supreme court as requiring a greater separation of church and state than that which is found in the Federal Constitution's Establishment Clause.¹⁶²

The court looked to the Supremacy Clause to determine whether the federal or state law should prevail.¹⁶³ Because "the Supremacy Clause makes clear [that] the laws of Congress which are made 'in pursuance' of the Constitution will prevail whenever there is a direct conflict with the constitutional law of a state,"¹⁶⁴ the

155. *Id.*

156. *Id.*

157. *Id.* at 1164.

158. *Id.*

159. See *supra* part III.A (discussing the *Garnett v. Renton School District* decision).

160. IDAHO CONST. art. IX, § 6.

161. *Id.* art. IX, § 5.

162. *Epeldi v. Engelking*, 488 P.2d 860, 865 (Idaho 1971), *cert. denied*, 406 U.S. 957 (1972).

163. See *supra* note 143 (quoting Supremacy Clause).

164. *Hoppock v. Twin Falls Sch. Dist.* No. 411, 772 F. Supp. 1160, 1162 (D. Idaho

initial inquiry was "whether the EAA was passed 'in pursuance' of the Constitution."¹⁶⁵ *Mergens* answered this question affirmatively with respect to the federal Establishment Clause.¹⁶⁶ After an examination of state sovereignty concerns, the *Hoppock* court concluded that, although state sovereignty is challenged by the EAA, the Act is nevertheless consistent with the Federal Constitution.¹⁶⁷ Thus, the power of the state constitution to override conflicting federal law is limited:

[T]he states are free to use their own constitutions to restrict or prohibit activity that the federal constitution permits. But when federal law mandates rather than simply permits certain activity, and that congressional mandate does not violate any of the limitations on congressional power . . . the Supremacy Clause takes over and prohibits the states from using their own constitution to block the federal law.¹⁶⁸

Accordingly, the court granted the students' request for declaratory judgment. The school district's refusal to allow the religious group to meet violated the EAA since "the Supremacy Clause provides that the Idaho Constitution cannot be used to block operation of the EAA."¹⁶⁹

IV. ARGUMENT

A. Federal Constitutional Requirements

The First Amendment to the United States Constitution requires that equal access be given to student religious speech, even if prohibited by the state constitution, because free speech rights are implicated. Thus, the EAA merely codifies a constitutional imperative. Once a school opens its facilities to extracurricular student groups, denial of access to a group wishing to meet for a religious purpose violates not only the EAA,¹⁷⁰ but also the First Amend-

1991).

165. *Id.*

166. *Board of Educ. v. Mergens*, 496 U.S. 226, 253 (1990).

167. *Hoppock*, 772 F. Supp. at 1163.

168. *Id.* at 1164.

169. *Id.* The court also granted the plaintiffs an injunction to enjoin the school district from interfering with the students' rights to form the club. *Id.*

170. *See supra* notes 64-79 and accompanying text.

ment of the Constitution,¹⁷¹ as applied to the states through the Fourteenth Amendment.¹⁷² Therefore, a state constitution cannot exempt a state from the requirement of equal access.

In *Mergens* the Supreme Court explicitly declined to consider students' claims that their free speech and free exercise rights had been abridged.¹⁷³ Six members of the Court, however, determined that compliance with the EAA's requirement of equal access did not violate the Establishment Clause.¹⁷⁴ Two other justices concluded that equal access did not *necessarily* violate the Establishment Clause as long as proper precautions were taken.¹⁷⁵ Yet, *Mergens* only established that equal access is constitutionally permitted, not that it is required. If equal access is *only* constitutionally permissible, a state may choose not to grant such access (ignoring for the moment the existence of the EAA). A close examination of the Supreme Court's First Amendment jurisprudence in the educational context, however, reveals that the drafters of the EAA were correct in their belief that the mandates of the Act are coextensive with the Constitution.¹⁷⁶

1. Constitutional Protections Afforded Student Speech

Tinker v. Des Moines Independent Community School Dis-

171. See *supra* note 7.

172. All of the provisions of the First Amendment have been incorporated into the Fourteenth Amendment. See *Everson v. Board of Educ.*, 330 U.S. 1, 14-16 (1947) (establishment clause); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (free exercise clause); *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937) (freedom of peaceable assembly and right to petition clauses); *Near v. Minnesota*, 283 U.S. 697, 707 (1931) (free press clause); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (free speech clause).

173. *Board of Educ. v. Mergens*, 496 U.S. 226, 253 (1990).

174. *Id.* at 248, 253, (plurality opinion of O'Connor, J., Rehnquist, C.J., and White and Blackmun, JJ.) (applying the *Lemon* test); *id.* at 260 (Kennedy and Scalia, JJ., concurring in part and concurring in the judgment) (applying the *Allegheny* test). See also *supra* part II.C (discussing in detail the *Lemon* and *Allegheny* tests and their application in *Mergens*).

175. *Mergens*, 496 U.S. at 262-63 (Marshall and Brennan, JJ., concurring in the judgment) (concluding that equal access in the high school context does not violate the Establishment Clause provided that schools take steps to disassociate themselves from the religious speech).

176. See *supra* notes 61-62 and accompanying text. This section of the note argues that equal access to student religious groups is required by the United States Constitution, regardless of the existence of the EAA. However, it is assumed that whenever a religious group seeks access to a school's forum, all the requirements of the EAA are met with respect to the nature of the group and the forum: the group is student initiated; the meetings are voluntary; the school neither sponsors nor endorses the group; and the school permits other noncurriculum related student groups to meet. 20 U.S.C. § 4071(c) (1988).

*trict*¹⁷⁷ is an early case that discussed the First Amendment rights of high school students. The students in *Tinker* claimed that their First Amendment rights were violated by a school policy which prohibited students from wearing black armbands on school premises to protest the war in Vietnam.¹⁷⁸ The Supreme Court agreed, holding that "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."¹⁷⁹

The Court declared that the speech of high school students is constitutionally protected, stating that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."¹⁸⁰ The Court recognized that school officials need to maintain order and discipline, acknowledging "the comprehensive authority of the States and of school officials, *consistent with fundamental constitutional safeguards*, to prescribe and control conduct in the schools."¹⁸¹ Thus, student conduct which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others" would not be entitled to constitutional protection.¹⁸² The Court noted, however, that there was nothing in the record to indicate that the students had created or would create a disturbance by wearing armbands.¹⁸³ The Court refused to permit the school to limit the students' free speech rights based on an "undifferentiated fear or apprehension of disturbance."¹⁸⁴ The Court acknowledged the risk that "[a]ny word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance," but declared that "our Constitution says we must take this risk."¹⁸⁵

*Board of Education, Island Trees Union Free School District v. Pico*¹⁸⁶ is a more recent case that affirms the First Amendment rights of students. In *Pico*, the students brought suit against the school board for removing from junior high and high school librar-

177. 393 U.S. 503 (1969).

178. *Id.* at 504-05.

179. *Id.* at 511.

180. *Id.* at 506.

181. *Id.* at 507 (emphasis added).

182. *Id.* at 513.

183. *Id.* at 514.

184. *Id.* at 508.

185. *Id.*

186. 457 U.S. 853 (1982).

ies several books which the board said contained inappropriate material.¹⁸⁷ The District Court for the Eastern District of New York granted summary judgment in favor of the school board,¹⁸⁸ but the Court of Appeals for the Second Circuit reversed and remanded.¹⁸⁹ The Supreme Court affirmed the Court of Appeals, concluding that further evidentiary findings regarding disputed factual issues needed to be made.¹⁹⁰

As in *Tinker*, three justices in *Pico* acknowledged that local school authorities have broad discretion regarding the daily operations of their schools.¹⁹¹ Four Justices, however, agreed with the *Tinker* Court's admonition that such discretion "must be exercised in a manner that comports with the transcendent imperatives of the First Amendment."¹⁹² The right of constitutionally protected speech extends to students both in the right of the speaker to transmit ideas and in the right of the listener to receive them.¹⁹³ Although the First Amendment rights of students "must be construed 'in light of the special characteristics of the school environment,'"¹⁹⁴ Justices Brennan, Marshall and Stevens concluded that the purposes and functions of the school library made it particularly appropriate to protect the students' First Amendment rights.¹⁹⁵

The three Justices noted that a library is a place for students "to test or expand upon ideas presented to [them], in or out of the classroom."¹⁹⁶ Therefore, since use of the library by the students

187. *Id.* at 857-59. The board found the books to be "anti-American, anti-Christian, anti-Semitic, and just plain filthy."

188. *Pico v. Board of Educ.*, 474 F. Supp. 387, 398 (E.D.N.Y. 1979), *rev'd*, 638 F.2d 404 (2d Cir. 1980), *aff'd*, 457 U.S. 853 (1982).

189. *Pico v. Board of Educ.*, 638 F.2d 404, 419 (2d Cir. 1980), *aff'd*, 457 U.S. 853 (1982).

190. *Pico v. Board of Educ.*, 457 U.S. 853, 875 (1982). The plurality opinion was authored by Justice Brennan, who was joined by Justices Marshall and Stevens in whole and Justice Blackmun in part. *Id.* at 855. Justice Blackmun wrote separately, concurring in part and concurring in the judgment, because he had "a somewhat different perspective on the nature of the First Amendment right involved." *Id.* at 876. Justice White concurred only in the judgment, refusing to reach the constitutional issue. *Id.* at 883.

191. *Id.* at 863-64. Justice Blackmun did not join in this section of the plurality opinion. *Id.* at 863-69.

192. *Id.* at 864-65 (Brennan, Marshall and Stevens, J.J.); *id.* at 876 (Blackmun, J., concurring in part and concurring in the judgment) ("[I]t is beyond dispute that schools and school boards must operate within the confines of the First Amendment.").

193. *Id.* at 867-68.

194. *Id.* at 868 (quoting *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969)).

195. *Id.*

196. *Id.* at 869 (quoting *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp

was voluntary and the choice of books wholly optional, the three Justices determined that the school board could not claim absolute discretion over the school library, as it could over compulsory matters such as the curriculum.¹⁹⁷

The plurality,¹⁹⁸ however, did not totally divest the school board of discretion of choosing books for the library. For instance, no constitutional violation would have occurred if books were removed because the board found the books to be "pervasively vulgar."¹⁹⁹ The "official suppression of *ideas*," however, could *not* be constitutionally tolerated.²⁰⁰ If the board intended "to deny [the students] access to ideas with which [the board] disagreed, . . . then [the board had] exercised [its] discretion in violation of the Constitution."²⁰¹ The plurality found that granting summary judgment was improper because there was a genuine issue of material fact as to whether the school board's motivation for removing the books was constitutionally permissible.²⁰²

Pico and *Tinker* lead to the conclusion that the First Amendment protection afforded speech applies to high school students. These cases also make it clear, however, that this right is limited by virtue of the special requirements of discipline and order needed within the educational environment.²⁰³ Thus, it is necessary to determine the extent to which students' constitutional rights may be limited to preserve the schools' ability to maintain order. Two cases are particularly helpful in shedding some light on this issue: *Bethel School District v. Fraser*²⁰⁴ and *Hazelwood School District v. Kuhlmeier*.²⁰⁵

In *Fraser*, a high school student brought suit after being suspended from school for three days because of the content of a speech he delivered to a student assembly.²⁰⁶ The speech, nominating a fellow student for a student government office, described the candidate "in terms of an elaborate, graphic, and explicit sexual

703, 715 (Mass. 1978)).

197. *Id.*

198. Justice Blackmun joined this portion of Justice Brennan's opinion. *Id.* at 869-75.

199. *Id.* at 871.

200. *Id.*

201. *Id.*

202. *Id.* at 872.

203. *See id.* at 863-66; *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 512-13 (1969).

204. 478 U.S. 675 (1986).

205. 484 U.S. 260 (1987).

206. *Fraser*, 478 U.S. at 678-79.

metaphor."²⁰⁷ The Supreme Court did not find a constitutional violation in the school's prohibition of such speech.²⁰⁸

The Court distinguished between the nondisruptive, political nature of the message conveyed by the wearing of the black armbands in *Tinker* and the sexual nature of Fraser's speech, which was clearly disruptive and offensive to other students.²⁰⁹ A primary function of the educational system is to inculcate "habits and manners of civility" which are fundamental to the process of democratic self-governance.²¹⁰ While such values "include tolerance of divergent political and religious views, even when the views expressed may be unpopular . . . these values must also take into account consideration of the sensibilities of others."²¹¹ Thus, a student's right to use offensive speech in a public school setting is not necessarily equivalent to an adult's right to use such speech in public.²¹² Furthermore, the otherwise constitutionally protected interest of a speaker may be limited where the speech is *sexually explicit* and the audience includes children.²¹³

In *Hazelwood School District v. Kuhlmeier*²¹⁴ the Court considered whether the First Amendment rights of high school students were violated when school officials deleted two pages of articles from the school newspaper. The newspaper was compiled by the Journalism II class and was published approximately once every three weeks.²¹⁵ The pages were deleted because they contained two stories that the school principal found objectionable: one relating the experiences of three students during pregnancy; and the other discussing the impact of divorce on specific students at the school.²¹⁶ The Court of Appeals found that the newspaper was a

207. *Id.*

208. *Id.* at 685.

209. *Id.* at 680-81, 683.

210. *Id.* at 681.

211. *Id.*

212. *Id.* at 682. In distinguishing between limitations that are appropriate when applied to student speech but inappropriate when applied to adult speech, the Court referred exclusively to speech that is in some manner lewd or offensive: "offensive form of expression"; "Cohen's jacket" (referring to the jacket at issue in *Cohen v. California*, 403 U.S. 15, 16 (1971), which said "Fuck the Draft" on its back); "vulgar and offensive terms"; "terms of debate highly offensive"; "[inappropriate] manner of speech"; "lewd, indecent, or offensive speech." *Fraser*, 478 U.S. at 682-83.

213. *Id.* at 684.

214. 484 U.S. 260 (1987).

215. *Id.* at 262.

216. *Id.* at 263-64. The entire two pages, rather than just the two offending stories, had to be eliminated because by the time the principal examined the page proofs it was too

public forum,²¹⁷ but the Supreme Court disagreed, holding the school's action constitutionally permissible.²¹⁸

The Supreme Court reaffirmed that student speech is entitled to constitutional protection, but noted that the extent of such protection may be limited to further the public school's basic educational mission.²¹⁹ The Supreme Court rejected the Court of Appeals' conclusion that the newspaper was a public forum since such a forum could only be created when the "school authorities [had] 'by policy or by practice' opened [school] facilities 'for indiscriminate use by the general public,' or by some segment of the public, such as student organizations."²²⁰

The newspaper had always been under the close supervision of the journalism teacher and operated according to specific criteria established by school board policy and the curriculum guide.²²¹ Furthermore, the students in the Journalism II class were graded and received academic credit for their participation in the production of the newspaper.²²² Therefore, in the face of this evidence, the Court found that the school did not intend to create a public forum, but instead, intended to provide "a supervised learning experience for journalism students."²²³

Thus, the question was not, as in *Tinker*, whether the school must tolerate particular student speech but "whether the First Amendment requires a school affirmatively to *promote* particular student speech" in the context of a school sponsored activity that is part of the curriculum.²²⁴ The Court concluded that the school is entitled "to set high standards for the student speech that is disseminated under its auspices . . . and may refuse to disseminate student speech that does not meet those standards."²²⁵

late to make the necessary changes and get the paper out before the end of the school year. *Id.*

217. *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1373-74 (8th Cir. 1986), *rev'd*, 484 U.S. 260 (1987). After finding that the school newspaper was a public forum, the Court of Appeals held that the newspaper could be censored upon a showing that the articles would have invaded the rights of others or been seriously disruptive. *Id.* at 1374.

218. *Kuhlmeier*, 484 U.S. at 276.

219. *Id.* at 266-67.

220. *Id.* at 267 (citation omitted) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983)).

221. *Id.* at 268.

222. *Id.*

223. *Id.* at 270.

224. *Id.* at 270-71 (emphasis added).

225. *Id.* at 271-72.

Overall, *Tinker*, *Pico*, *Fraser*, and *Kuhlmeier* illustrate the attitude of the Supreme Court regarding the free speech rights of high school students. *Tinker* stated that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"²²⁶ and *Pico*, *Fraser* and *Kuhlmeier* reiterated this sentiment.²²⁷ These four cases, however, also caution that a student's right to express his or her views within the school environment is limited to the extent that such expression disrupts or interferes with the school's basic educational objective.²²⁸

Kuhlmeier and *Fraser* are examples of student speech that is sufficiently disruptive to legitimate educational purposes to warrant intrusion into the students' generally protected right to free speech.²²⁹ The *Fraser* Court permitted such an intrusion when the speech offends the sensibilities of others because it was "offensively lewd and indecent."²³⁰ The Court repeatedly referred to speech that is sexually graphic or otherwise lewd or indecent.²³¹ At the same time, the *Fraser* opinion expressly acknowledged the "undoubted freedom to advocate unpopular and controversial views in schools and classrooms" and the important role of the schools in teaching the fundamental value of "tolerance of divergent political and religious views."²³² In *Kuhlmeier*, the Court allowed the school to exercise control over student speech that dealt with controversial subjects, rather than just those which are sexually oriented, emphasizing that such control must be exercised in the context of a school-sponsored activity.²³³ The Court concluded that when the student speech at issue is related to a school-sponsored activity, the *Tinker* standard does not apply.²³⁴

226. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969).

227. *Kuhlmeier*, 484 U.S. at 266; *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 680 (1986); *Pico v. Board of Educ.*, 457 U.S. 853, 865 (1982).

228. See *Kuhlmeier*, 484 U.S. at 266-67; *Fraser*, 478 U.S. at 682-83; *Pico*, 457 U.S. at 863-64; *Tinker*, 393 U.S. at 507.

229. *Kuhlmeier*, 484 U.S. at 273; *Fraser*, 478 U.S. at 685-86.

230. *Fraser*, 478 U.S. at 685.

231. *Id.* at 680-83. See also *supra* note 212.

232. *Fraser*, 478 U.S. at 681 (emphasis added).

233. See *Kuhlmeier*, 484 U.S. at 270-72 (indicating areas in which educators are entitled to exercise greater control: "school-sponsored publications . . . that . . . might reasonably [be] perceive[d] to bear the imprimatur of the school"; "activities that are part of the school curriculum"; "student speech that is disseminated under [the school's] auspices"; and refusal "to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use [or] irresponsible sex").

234. *Id.* at 272-73.

2. Student Religious Speech Is Constitutionally Protected

The issue of free speech rights for student religious groups seeking equal access to a school's forum should be controlled by the standard enunciated by the Court in *Tinker* and *Pico*, rather than that in *Fraser* and *Kuhlmeier*. *Tinker* does not permit suppression of student speech, even if that speech expresses an unpopular or controversial viewpoint, unless there is evidence that the speech tends to "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."²³⁵ The EAA essentially adopts this standard, requiring that "meeting[s] do] not materially and substantially interfere with the orderly conduct of educational activities within the school."²³⁶ Furthermore, guidelines prepared jointly by supporters and opponents of the EAA and incorporated into the Congressional Record also addressed the issue of local control, stating that "[t]he Act does not limit the authority of the school to maintain order and discipline or to protect the well-being of students and faculty."²³⁷ Thus, student speech that is disruptive or interferes with the school's educational mission falls outside of both the scope of the Act and the constitutional protection afforded by *Tinker*.

Fraser may place additional limitations on a student group's claim of entitlement to constitutional protection of its speech. Under *Fraser*, a group requesting access to the school's forum to engage in speech that is sexually explicit, lewd, or otherwise indecent may be refused if the speech is "wholly inconsistent with the 'fundamental values' of public school education."²³⁸ A school requirement that meetings may not contain such speech is essentially a "manner" restriction, which is not prohibited by the Act.²³⁹

235. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 509 (1969) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

236. 20 U.S.C. § 4071(c)(4) (1988). See also S. REP. NO. 357, *supra* note 44, at 40, reprinted in 1984 U.S.C.C.A.N. at 2386 (discussing the nearly identical provision contained in an earlier version of the Act and noting that the language mirrors that of *Tinker*).

237. 130 CONG. REC. H12270, H12271 (1984) (presentation of Equal Access Guidelines to Congress by Rep. Bonker). These guidelines are particularly helpful since a congressional report was not issued for the final version of the EAA.

238. See *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685-86 (1986). Denial of access probably would not extend to a group discussing controversial political or social topics which happen to be sex-related (i.e., abortion, AIDS, homosexuality, etc.) provided that such discussions were carried on in a nondisruptive manner which comported with "the habits and manners of civility." *Id.* at 681.

239. See SEN. REP. NO. 357, *supra* note 44, at 39, reprinted in 1984 U.S.C.C.A.N. at

Thus, while the school cannot control the content of the speech (i.e., sex-related matters), it can control the order and discipline of the meeting by requiring that the *manner* of speaking not be lewd or obscene.

In *Kuhlmeier*, the Court permitted the school to exercise substantial control over student speech in the school newspaper.²⁴⁰ This same degree of control would not be applicable to student-initiated religious groups under the EAA. First, such a group would never be school-sponsored since the EAA expressly requires absence of sponsorship.²⁴¹ Second, as the Supreme Court concluded in *Mergens*, providing equal access is not an endorsement of religious speech, but rather demonstrates neutrality to such speech and thereby avoids transmitting a hostile message toward religion.²⁴² Therefore, if a school complies with the requirements of the EAA, *Kuhlmeier* is inapplicable since the student speech at issue is not school-sponsored. Thus, the school could not restrict the speech at such meetings beyond that permitted by *Tinker* and *Fraser*.²⁴³

The limited open forum which triggers the requirements of the EAA, like the school library in *Pico*, is "especially appropriate for the recognition of the First Amendment rights of students."²⁴⁴ Three justices in *Pico* recognized the value of the school library as a place where students "can literally explore the unknown, and discover areas of interest and thought not covered by the prescribed curriculum."²⁴⁵ Similarly, when a school establishes a limited open forum within the terms of the EAA, it is allowing "noncurriculum related student groups to meet on school premises during noninstructional time."²⁴⁶

2385 ("There could be many neutral and impartial time, place, and manner restrictions placed on the use of school facilities.").

240. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272-73 (1987).

241. 20 U.S.C. § 4071(c)(1)-(2).

242. *Board of Educ. v. Mergens*, 496 U.S. 226, 248 (1990) (plurality opinion). The concurring opinion of Justice Kennedy, joined by Justice Scalia, found application of the "endorsement" test inappropriate, but concluded that "[t]he accommodation of religion mandated by the Act is a neutral one." *Id.* at 260-61. The concurring opinion of Justice Marshall, joined by Justice Brennan, found that compliance with the Act was not a per se endorsement of religion, provided that the school affirmatively disassociated itself from the religious group's speech. *Id.* at 269-70.

243. See *supra* notes 177-85, 206-13 and accompanying text.

244. *Pico v. Board of Educ.*, 457 U.S. 853, 868 (1982).

245. *Id.* at 869 (quoting *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 715 (D. Mass. 1978)).

246. 20 U.S.C. § 4071(b).

The EAA requires that attendance at student meetings be "voluntary and student-initiated,"²⁴⁷ which is analogous to the "completely voluntary" use of the school library in *Pico* where the selection of books was "entirely a matter of free choice."²⁴⁸ By granting students nondiscriminatory access to the forum to engage in religious or other speech, the school is permitting the same exploration of new ideas and independent thinking that was found to be of such vital importance in *Pico*.

Examination of the Supreme Court's decisions regarding the free speech rights of high school students has revealed that a student-initiated religious group which falls within the terms of the EAA is protected from discriminatory treatment by school officials. Such treatment is demanded not only by the EAA, but also by the Free Speech Clause of the First Amendment. Indeed, several lower courts which have considered equal access and freedom of speech claims have acknowledged that students' First Amendment rights were implicated, but have found that the Establishment Clause outweighed the students' other constitutional rights.²⁴⁹ When the Supreme Court concluded in *Mergens*, however, that equal access does not violate Establishment Clause principles,²⁵⁰ it established that the Establishment Clause does not provide a justification for disallowing student religious groups to meet in a school's forum.²⁵¹

Those lower courts which have held otherwise distinguished *Widmar v. Vincent*, which explicitly concluded that the Establishment Clause did not provide the "compelling state interest" required to justify the school's content-based discrimination against the otherwise protected religious speech of students.²⁵² These courts distinguished the college students in *Widmar* from younger students, relying on a footnote in *Widmar* which stated: "University students are, of course, young adults. They are less impressionable

247. *Id.* § 4071(c)(1).

248. *Pico*, 457 U.S. at 869.

249. See, e.g., *Bell v. Little Axe Indep. Sch. Dist.*, 766 F.2d 1391, 1400-01, 1407 (10th Cir. 1985); *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 559 (3d Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986); *Brandon v. Board of Educ.*, 635 F.2d 971, 980 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

250. *Board of Educ. v. Mergens*, 496 U.S. 226, 253 (1990). See also *supra*, part II.C (discussing *Mergens* in detail).

251. This assumes, of course, that the EAA's requirements of voluntariness, non-sponsorship, and noninterference with the orderly conduct of educational activities have been met.

252. *Widmar v. Vincent*, 454 U.S. 263, 270-71, 276 (1981).

than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion."²⁵³

This distinction between high school and college students is relevant to the determination of whether equal access either advances or inhibits religion, which is the second prong of the *Lemon* test.²⁵⁴ If the students perceive the school's policy as one of favoritism, rather than neutrality, toward religion, then religion is impermissibly "advanced" in violation of the Establishment Clause. For example, the Court of Appeals in *Bender v. Williamsport Area School District*²⁵⁵ found that the difference in maturity and impressionability between a high school student and a college student justified the conclusion that younger students would be less able to understand that equal access signified government neutrality, rather than favoritism, toward religion.²⁵⁶ Similarly, the court in *Lubbock Civil Liberties Union v. Lubbock Independent School District*²⁵⁷ pointed to the age and impressionability of the students to support its conclusion that the school's equal access policy created the impermissible perception of state endorsement of religion.²⁵⁸ The same distinction was relied on by the Ninth Circuit Court of Appeals in *Garnett v. Renton School District*.²⁵⁹ The decision was later vacated and remanded by the Supreme Court for consideration in light of *Mergens*.²⁶⁰

The *Mergens* decision and the legislative history of the EAA, however, indicate that this distinction, based on the age of the students, is unwarranted. The plurality in *Mergens* rejected the argument that age difference justifies a different resolution of the Establishment Clause issue:

We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a non-discriminatory basis. The proposition that schools do not endorse everything they fail to censor is not complicated.

253. *Id.* at 274 n.14.

254. See *supra* note 28 and accompanying text (describing the elements of the *Lemon* test).

255. 741 F.2d 538 (3d Cir. 1984).

256. *Id.* at 552.

257. 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983).

258. *Id.* at 1045-46.

259. 874 F.2d 608, 611-12 (9th Cir. 1989), *vacated*, 496 U.S. 914 (1990).

260. *Board of Educ. v. Mergens*, 496 U.S. 914 (1990).

"[P]articularly in this age of massive media information . . . the few years difference in age between high school and college students [does not] justif[y] departing from *Widmar*."²⁶¹

Justice Marshall's concurring opinion concluded that no Establishment Clause violation exists when the school takes steps to avoid the appearance of endorsing the goals of the religious groups.²⁶² He concluded that it is "the school's behavior, *not the purported immaturity of high school students*, [which] is dispositive."²⁶³ Six justices in *Mergens* found that the difference in the age and maturity levels of high school and college students was irrelevant to the determination of whether granting equal access to religious groups would be perceived as an endorsement.²⁶⁴

The congressional supporters of the EAA were aware of the perception that elementary and high school students were incapable of separating state neutrality from state sponsorship of religion.²⁶⁵ The Senate Committee on the Judiciary, however, based on psychological evidence and direct testimony from seven students, found that "students below the college level are capable of distinguishing between State-initiated, school-sponsored, or teacher-led religious speech on the one hand and student-initiated, student-led religious speech on the other."²⁶⁶ The Committee also determined that denial of equal access created a reasonable perception by the students

261. *Id.* at 250 (citations omitted) (alteration in original) (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 556 (1986) (Powell, J., dissenting)).

262. *Id.* at 262-63. Justice Marshall pointed to the University of Missouri in *Widmar v. Vincent* as an example of a school taking the proper measures to avoid the appearance of endorsing religious activities. *Id.* at 266-67. Justice Marshall noted that the University's forum included many more groups than did the high school at issue in *Mergens*, including politically-oriented groups, and that the University's student handbook specifically disclaimed any identification with or endorsement of the goals of any student group. *Id.*

263. *Id.* at 267 (emphasis added).

264. *See id.* at 229, 250 (plurality opinion of O'Connor, J., joined by Rehnquist, C.J., and White and Blackmun, J.J.); *id.* at 262, 267 (Marshall and Brennan, J.J., concurring in the judgment). The concurring opinion of Justice Kennedy, joined by Justice Scalia, rejected the "endorsement" test and adopted a test which asked instead whether the school impermissibly coerced a student into participating in religious activity. *Id.* at 260-61. While conceding that "[t]he inquiry with respect to coercion . . . must be undertaken with sensitivity to the special circumstances that exist in a secondary school," Justice Kennedy found that coercion does not necessarily result from compliance with the EAA. *Id.* at 261-62.

265. SEN. REP. NO. 357, *supra* note 44, at 9, 34, reprinted in 1984 U.S.C.C.A.N. at 2355, 2384.

266. *Id.* at 35, reprinted in 1984 U.S.C.C.A.N. at 2381.

of state hostility toward religion.²⁶⁷ The Committee, therefore, concluded that denial of equal access rested on false assumptions contrary to its findings.²⁶⁸ As the Committee noted, what is important with respect to Establishment Clause concerns is that there be no *reasonable* perception of *state* sponsorship of religious activity.²⁶⁹ While the Committee recognized that equal access may in some sense advance religion, such "advancement . . . would come from the students themselves and this the Establishment Clause does not bar."²⁷⁰ The report of the House Committee on Education and Labor on the EAA similarly rejected the notion that students below the college level are unable to distinguish state neutrality from favoritism.²⁷¹

Once this unfounded distinction between college and high school students is removed, there is nothing that justifies a result on the issue of equal access in high schools different from that reached in *Widmar*.²⁷² Even if the EAA had not been enacted, students still have free speech rights that are entitled to constitutional protection.²⁷³ There are no countervailing Establishment Clause concerns that could provide the compelling state interest required to justify a content-based exclusion of student speech from a forum generally open for such speech. Thus, while a high school need not favor religion by *providing* a forum for religious activity and discussion, once it has chosen to open a forum for student-initiated speech it cannot exclude religious speech from that forum without violating the First Amendment of the Constitution.

267. *Id.* at 36, reprinted in 1984 U.S.C.C.A.N. at 2382.

268. *Id.* at 9-10, reprinted in 1984 U.S.C.C.A.N. at 2355-56.

269. *Id.* at 35-36, reprinted in 1984 U.S.C.C.A.N. at 2381-82.

270. *Id.* at 34, reprinted in 1984 U.S.C.C.A.N. at 2380.

271. See H.R. REP. NO. 710, *supra* note 46, at 3-5; Ira C. Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739, 757 (1986) ("[S]uch a protective attitude toward secondary school students is inconsistent with the premise that students possess rational and autonomous intellects, enabling them to absorb and select among differing points of view."); Arp, *supra* note 79, at 157 ("[C]ourts . . . should acknowledge that the distinction between high school students and college students is not as dramatic as formerly construed.").

272. See *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) (holding that a University could not refuse to allow a student religious group to use University facilities because the group's activities were "forms of speech and association protected by the First Amendment.").

273. See *supra* part IV.A.1.

B. Preemption by the EAA

The Federal Constitution requires that the EAA prevail over a conflicting state constitution because the Federal Act preempts state law. Under the Supremacy Clause of the Federal Constitution, Congress has the power to override or preempt contrary state law in any area in which it has the constitutional power to legislate.²⁷⁴ In *Garnett v. Renton School District*,²⁷⁵ Judge McGovern found neither explicit nor implied congressional intent in the EAA to preempt contrary state constitutional law.²⁷⁶ In fact, Judge McGovern's opinion construes language contained in the Act as explicitly permitting states to supersede the mandates of the federal law if, under state law, equal access would be prohibited.²⁷⁷ Upon closer examination, however, Judge McGovern's interpretation of the Act's language is unpersuasive because it completely fails to recognize clearly inferable congressional intent to preempt contrary state law.

1. The Language of the Act

Judge McGovern correctly stated that the EAA did not contain express language indicating a congressional intent to preempt state law.²⁷⁸ McGovern's opinion, however, also stated that

[t]he plain language of the Act is clear that Congress did

274. U.S. CONST. art. VI, cl. 2. See, e.g., *Pacific Gas & Elec. v. State Energy Conservation & Dev. Comm'n*, 461 U.S. 190, 203 (1983) ("It is well-established that within constitutional limits Congress may pre-empt state authority by so stating in express terms. Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be found from a [pervasive] 'scheme of federal regulation' . . .") (citation omitted) (quoting *Rice v. Santa Fe Elevator*, 331 U.S. 218, 230 (1947)).

275. 772 F. Supp. 531 (W.D. Wash. 1991).

276. *Id.* at 537-38. See also *supra* notes 143-52 and accompanying text (discussing in detail Judge McGovern's analysis of whether Congress intended for the EAA to preempt state constitutional law).

277. See *Garnett*, 772 F. Supp. at 537 (stating that the EAA was not to be construed to sanction otherwise unlawful activities or to abridge constitutional rights); *supra* notes 138-39 and accompanying text. Although the *Garnett* court's reasoning is based on the Washington State Constitution, nothing in the opinion precludes application of this reasoning to a state statute. Thus, if Judge McGovern interpreted the operative language of the Act correctly, it would seem to permit any state, regardless of its constitutional provisions, to pass legislation effectively exempting that state from the mandates of the EAA.

278. *Garnett*, 772 F. Supp. at 537. It is not surprising that express language of preemption is not found in the Act. Relatively few cases raising the preemption question turn on such explicit language; thus, it is usually necessary to discern or infer congressional intent to preempt state law. KENNETH STARR ET AL., *THE LAW OF PREEMPTION: A REPORT OF THE APPELLATE JUDGES CONFERENCE*, AMERICAN BAR ASSOCIATION 14-15 (1991).

not legislate so comprehensively as to occupy an entire field of regulation:

Nothing in this [Act] shall be construed to authorize the United States or any State or political subdivision thereof — . . .

(5) to sanction meetings that are otherwise unlawful;
[or]

. . .

(7) to abridge the constitutional rights of any person.²⁷⁹

Judge McGovern interpreted these clauses to exempt from the EAA any state having a strict constitutional prohibition on public support of religion or religious influence in public schools.²⁸⁰ This conclusion, however, does not withstand an examination of the intentions and motivations of the drafters of the EAA.

The legislative history of the EAA provides persuasive evidence of what these clauses of the Act were intended *not* to do. The debates on the floor of Congress and the congressional reports indicate that the drafters and virtually all of the EAA's supporters believed that it was necessary to "clarify and confirm the First Amendment rights of freedom of speech, freedom of association, and free exercise of religion which accrue to public school students."²⁸¹ This need for clarity resulted primarily from several conflicting lower court decisions which left school administrators confused regarding the ability of students to engage in religious speech.²⁸² In other words, the drafters and most supporters of the Act did not feel that the EAA was necessary to *confer* the right to equal access upon high school students; they believed that the right already existed and was protected by the First Amendment.²⁸³

It is clear that if equal access is required by the First Amendment's Free Speech, Free Association, and Free Exercise Clauses, Congress cannot pass a law exempting states from an equal access requirement for any reason, including a conflicting

279. *Garnett*, 772 F. Supp at 537 (alteration in original) (quoting 20 U.S.C. § 4071(d) (1988)).

280. *See id.* (stating that the EAA should not be interpreted to condone otherwise unlawful activities or abridge constitutional rights); *supra* notes 138-39 and accompanying text.

281. S. REP. NO. 357, *supra* note 44, at 3, reprinted in 1984 U.S.C.C.A.N. at 2349.

282. *See supra* notes 61-64 and accompanying text.

283. *See supra* note 62 and accompanying text.

state constitutional provision. The Supremacy Clause clearly states that "[the federal] Constitution . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."²⁸⁴ Although Congress has the power to excuse a state from a congressional directive, it does not have that same power with respect to a constitutional imperative.²⁸⁵ If equal access is constitutionally required,²⁸⁶ the two clauses in the EAA upon which Judge McGovern relies to allow the Washington State Constitution to supersede the Act's requirements cannot be interpreted in this manner and remain consistent with the Federal Constitution. Thus, regardless of whether equal access is *in fact* constitutionally required, the drafters of the EAA could not possibly have intended that this language be given the meaning which Judge McGovern ascribes to it. The drafters believed that the EAA merely codified a constitutional imperative.²⁸⁷ They could not have intended the Act to permit a state constitution to override the Act's requirements, since to do so would allow a state constitution to supersede what they believed was a federal constitutional requirement, in violation of the Supremacy Clause.

Since these two clauses of the EAA should not be given the

284. U.S. CONST. art. VI, cl. 2.

285. See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 732-33 (1981) (noting that while Congress has broad powers under the Fourteenth Amendment to grant to individuals equality of civil rights and equal protection of the laws against State intervention, "neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment"); *Williams v. Rhodes*, 393 U.S. 23, 29 (1968) (indicating that while the Constitution grants Congress specific power to legislate in certain areas, "these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution"); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (stating that "those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void").

286. There are differing views on whether equal access is mandated by the constitution. See, e.g., Laycock, *supra* note 1, at 35 (arguing that if a school has an open forum, then equal access for student religious groups is constitutionally required); Lupu, *supra* note 271, at 755-78 (noting that under some circumstances, free speech concerns may outweigh establishment clause concerns and, thus, make equal access constitutionally required); Nadine Strossen, *A Framework for Evaluating Equal Access Claims by Student Religious Groups: Is There a Window for Free Speech in the Wall Separating Church and State?*, 71 CORNELL L. REV. 143, 157-58 (1985) (claiming that an absolute rule either granting or denying equal access to student religious groups is constitutionally unworkable and arguing instead that equal access disputes must be settled on a case-by-case basis); *supra* part IV.A.

287. See *supra* notes 61-63 and accompanying text.

effect which Judge McGovern gave them it must be determined precisely what they *are* intended to mean. Unfortunately, the House and Senate reports provide little assistance because, at the time these reports were written, the Act did not yet contain these clauses in their final forms.²⁸⁸ The "Equal Access Guidelines," however, written after the Act's passage and included in the Congressional Record,²⁸⁹ do provide some insight into the ultimate inclusion of these two clauses. Specifically, the guidelines twice make reference to the "otherwise unlawful" clause (Section 4071(d)(5) of the Act).²⁹⁰

The first such reference states that while the Act prohibits a denial of equal access to groups wishing to discuss controversial topics, a school nevertheless "must not sanction meetings in which unlawful conduct occurs."²⁹¹ The second reference addresses the possibility of hate groups being granted access to the school forum under the Act and states that "[s]tudent groups which are unlawful . . . can be excluded."²⁹² These references do not suggest that the exclusion of otherwise unlawful meetings from the Act's protection was intended to allow school officials to exclude student religious groups from the forum. Instead, the guidelines specifically state that content-based exclusions of student groups may not be tolerated.²⁹³ The guidelines also note, however, that neither will unlawful *conduct within* the meetings themselves be tolerated.²⁹⁴ Thus, it is not the nature of the group itself which permits its exclusion from the forum, but the nature of the group's activities and the manner in which its meetings are conducted.

This interpretation of the language follows from the debates which took place in both houses of Congress. Several legislators expressed concern regarding the possible protection that the EAA

288. See H.R. REP. NO. 710, *supra* note 46, at 9-10 (considering a version of the Act which did not contain any language comparable to the "otherwise unlawful" or "unconstitutional" clauses); S. REP. NO. 357, *supra* note 44, at 36-41, *reprinted in* 1984 U.S.C.C.A.N. at 2382-87 (considering a version of the EAA which contained in § 3(4) language similar to the "otherwise unlawful" clause but did not contain language comparable to the "unconstitutional clause").

289. 130 CONG. REC. H12,270 (1984).

290. *Id.* at H12,272.

291. *Id.*

292. *Id.*

293. *Id.* ("Students who wish to discuss controversial social and legal issues . . . may not be barred on the basis of the content of their speech.").

294. *Id.*

may afford to groups which advocate or participate in violent or unlawful conduct.²⁹⁵ Since the Act explicitly denies protection to groups which intend to engage in illegal activities, however, it insures that public schools will not be used for the recruitment efforts of such groups.

The unconstitutionality clause can be interpreted in a similar manner. This clause states that the Act does not permit government action which would "abridge the constitutional rights of any person."²⁹⁶ Such a violation of constitutional rights may occur because of the *manner* in which meetings are conducted. For example, concern was expressed during a Senate debate that the EAA might permit school officials to discriminate against students who choose not to participate in religious meetings permitted under the Act or that the meetings permitted by the Act may go beyond religious discussion and amount to actual religious services within the school.²⁹⁷ Such actions would be beyond the reach of the Act's protections and violate the Free Exercise and Establishment Clauses.

2. Implied Congressional Intent

While the *Garnett* opinion acknowledged that congressional intent to preempt state law may be inferred,²⁹⁸ Judge McGovern concluded that the Act did not reveal an "intent to displace the Washington [state] constitution."²⁹⁹ This conclusion does not withstand closer scrutiny of the congressional intent behind the EAA and its practical effect.

Congressional intent to preempt state law may be inferred when Congress has legislated so pervasively on a matter that it has "occupied the field." Preemption also occurs when the state law stands

295. See, e.g., 130 CONG. REC. S8343 (1984) (statements of Sen. Gorton noting that the EAA could potentially protect a Ku Klux Klan meeting); *id.* at H3858 (statements of Rep. Mitchell expressing concern that the EAA could protect meetings held by hate groups and satanic cults); *id.* at H3861 (statements of Rep. Ackerman suggesting that hate groups, satanic worshippers, and those practicing animal sacrifice could claim protection under the EAA).

296. 20 U.S.C. § 4071(d)(7) (1988).

297. 130 CONG. REC. S8360 (statements of Sen. Weicker).

298. *Garnett v. Renton Sch. Dist.*, 772 F. Supp. 531, 537 (W.D. Wash. 1991) (stating that courts infer [congressional intent to preempt state law] where Congress has legislated comprehensively to occupy an entire field of regulation . . . or where the state law at issue conflicts with federal law" (quoting *Northwest Central Pipeline v. Kansas Corp. Comm'n*, 489 U.S. 493, 509 (1989))).

299. *Id.* at 538.

as an "obstacle" to the fulfillment of congressional goals.³⁰⁰ The basic principles of the preemption doctrine are summarized in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*.³⁰¹

Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be found from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' because 'the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.'" Even where Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises . . . where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."³⁰²

In order to determine whether Congress has occupied a field, a court must examine the federal interest that will be furthered by the legislation. The EAA concerns an area where there is a dominant federal interest. The stated purpose of the bill is to protect student rights of freedom of speech, freedom of association and free exercise of religion under the First Amendment of the United States Constitution.³⁰³ The protection of rights guaranteed by the Federal Constitution is a substantial federal interest. Enactment of the EAA was deemed necessary because students were being denied their constitutional rights.³⁰⁴ As recognized by the federal

300. See STARR ET AL., *supra* note 279, at 18-30.

301. 461 U.S. 190 (1983).

302. *Id.* at 203-04 (alteration in original) (citations omitted) (quoting *Fidelity Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) and *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). While the *Garnett* opinion quotes a portion of this statement, as it appeared in *Northwest Central Pipeline*, 489 U.S. at 537, the statement in *Pacific Gas & Electric* is a more complete description of the factors to be considered under this test for preemption. The language found in both *Pacific Gas & Electric* and *Northwest Central Pipeline* originated in *Hines v. Davidowitz*, 312 U.S. 52 (1941).

303. See *supra* note 63 and accompanying text.

304. See *supra* notes 46-53, 60-63 and accompanying text.

district court in *Hoppock v. Twin Falls School District*,³⁰⁵ “the Supreme Court has consistently limited local control over the schools when the First Amendment is at issue.”³⁰⁶

Congressional intent to preempt state law is also found where federal and state laws conflict since the “state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”³⁰⁷ This “obstacle preemption” test is the most persuasive argument for inferring that Congress intended to preempt contrary state constitutional law when it enacted the EAA. *Michigan Canners & Freezers Ass’n v. Agricultural Marketing and Bargaining Board*³⁰⁸ is an example of such obstacle preemption. In this case, the laws in question were the federal Agricultural Fair Practices Act of 1967 (“AFPA”) and the State of Michigan’s Agricultural Marketing and Bargaining Act (“Michigan Act”).³⁰⁹ The AFPA was enacted to equalize the bargaining positions of producers and processors of agricultural products.³¹⁰ The Act protected the right of producers to choose to sell their products themselves or to sell through a cooperative association, and specifically forbade the associations from coercing any producer into joining an association.³¹¹ The Michigan Act also was designed to facilitate and protect producers’ collective action.³¹² The Michigan Act went further than the AFPA, providing for state accreditation as the exclusive bargaining agent of a producers’ association which was comprised of more than 50% of the state’s producers of a particular commodity and whose production accounted for more than 50% of the state’s total production of that commodity.³¹³ Once accredited, all producers of the commodity were bound by the association’s contracts.³¹⁴ The Supreme Court held that the Michigan Act was preempted by the AFPA because it stood “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”³¹⁵ The Court reached this

305. 772 F. Supp. 1160 (D. Idaho 1991).

306. *Id.* at 1163.

307. *Pacific Gas & Electric*, 461 U.S. at 204 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

308. 467 U.S. 461 (1984).

309. *Id.* at 463.

310. *Id.* at 464.

311. *Id.* at 464-65.

312. *Id.* at 466.

313. *Id.* at 466.

314. *Id.* at 466-68.

315. *Id.* at 478 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

conclusion notwithstanding language in the AFPA which stated that it "shall not be construed to change or modify existing State law."³¹⁶

The Court looked to both the language and the legislative history of the AFPA to determine the Act's intended goals.³¹⁷ The language of the Act indicated that its purpose was to protect the right of producers to *voluntarily* join cooperative organizations and to insure that processors would not coerce the producers into joining such organizations.³¹⁸ The AFPA's legislative history also evidenced a desire to protect producers from coercive influences exerted by processors or other producers.³¹⁹ Given this goal, the Court found that the Michigan Act conflicted with the AFPA since it permitted the formation of associations which had the power to coerce producers into selling their products according to the terms dictated by the association.³²⁰ Thus, while the AFPA did not explicitly prohibit a state from requiring exclusive representation of producers, the Michigan Act nevertheless conflicted with the federal law because it "empower[ed] producers' associations to do precisely what the federal Act [forbade] them to do."³²¹

Like the Michigan Act, Washington's constitution permits precisely what the EAA forbids, thereby frustrating accomplishment of the federal law's goals. These goals are clearly stated in both the language and the legislative history of the EAA. The first section of the Act provides that a school may not "deny equal access or a fair opportunity to, or discriminate against, any students . . . on the basis of the religious, political, philosophical or other content of [their] speech at such meetings."³²² The legislative history evi-

316. *Id.* at 469 (quoting 7 U.S.C. § 2305(d) (1982)).

317. *Id.* at 470-77.

318. *Id.* at 470-71. The Court looked specifically to two sections of the AFPA. First, § 2301 reported a finding that "the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together voluntarily in cooperative organizations." *Id.* (quoting 7 U.S.C. § 2303 (1982)). Second, § 2303 made it unlawful to coerce a producer "in the exercise of his right . . . to refrain from joining or belonging to an association of producers" *Id.* at 471 (quoting 7 U.S.C. § 2303(a) (1982)).

319. *Id.* at 471-77. The Court examined congressional hearing transcripts, amendments to and revisions of the original bill, as well as Senate and House reports. It was clear from this history that the final version of the AFPA was specifically intended to protect not only the producer's right to join a cooperative organization, but also the producer's right *not* to do so.

320. *Id.* at 477.

321. *Id.* at 477-78.

322. 20 U.S.C. § 4071(a) (1988).

dences Congress' intent to protect students' First Amendment right to engage in controversial speech within the public school.³²³ If a state constitution permitted the state to exempt itself from the requirements of the EAA, the very purpose of the EAA would be severely undermined. Many state constitutions, similar to those of Washington and Idaho, contain specific prohibitions against state aid to religion and, thus, require a stricter separation of church and state than does the federal Establishment Clause.³²⁴ If these state constitutional provisions exempt the states from the EAA's requirements, Congress' intent to prevent discrimination by public schools against religious speech and to eliminate the perception of state hostility toward such speech³²⁵ will be wholly frustrated. The EAA would not have been necessary if Congress believed that the right of students to engage in such speech was being adequately protected by the states. The need for such legislation arose precisely because school officials were prohibiting religious speech by student groups.³²⁶

Furthermore, if the "unconstitutional" clause of the EAA³²⁷ is interpreted to exempt states with strict state establishment prohibitions, then presumably the "otherwise unlawful" clause of the Act³²⁸ would apply with equal force to states with legislative enactments prohibiting equal access. Thus, any state which wanted to avoid granting equal access to student religious groups could simply pass a law prohibiting religious meetings on school property. In

323. See *supra* part II.B.

324. See, e.g., G. Alan Tarr, *Religion under State Constitutions*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 65, 69 (1988) ("Most state constitutions . . . seek to maintain a separation of church and state in the realm of education, in part . . . by preventing [the diversion of public funds] to sectarian institutions or purposes, and in part by banning religious practices in schools receiving state funds."); DONALD E. BOLES, *THE BIBLE, RELIGION, AND THE PUBLIC SCHOOLS* 43 (1965) ("[A]ll states but Vermont have constitutional provisions prohibiting the expenditure of public funds, or at least school funds for sectarian purposes.").

325. See S. REP. NO. 357, *supra* note 44, at 14-21, reprinted in 1984 U.S.C.C.A.N. at 2360-67 (discussing the need for legislation to protect students' First Amendment rights and eliminate the perception of state hostility toward religion).

326. See *id.* at 11-14, reprinted in 1984 U.S.C.C.A.N. at 2357-60 (citing examples of school prohibition of student religious speech and discussing the need for legislation to rectify the situation).

327. See 20 U.S.C. § 4071(d)(7) (1988) (stating that nothing in the Act shall permit the government to "abridge the constitutional rights of any person").

328. See *id.* § 4071(d)(5) (stating that the Act shall not permit the government to "sanction meetings that are otherwise unlawful").

theory, all states that denied equal access prior to the passage of the EAA could continue to do so; if not by state constitutional provision then by state legislative enactment. It is difficult to believe that Congress would pass a law basically telling the states that "this is what you are required to do . . . unless you would rather not." That is precisely the position, however, to which the EAA would be relegated if Judge McGovern's interpretation of the statute is adopted. The EAA would, in essence, become a nullity.

The best long-term solution for resolving the dispute over the EAA's application in light of a conflicting state constitution is an amendment to the Act, which makes clear Congress' intent to preempt state law. Although the intent to preempt can be implied,³²⁹ an express declaration of such intent would leave no doubt as to the operation of the Act and allow courts to avoid the appearance of legislating. This result is particularly important in a federalist system which requires "an especially clear statement of congressional intent to oust states from their traditional legislative functions."³³⁰ Institutional concerns regarding the appropriate allocation of responsibilities between the legislative and judicial branches demand that legislative intent to preempt state law be apparent.³³¹ Thus, the danger of having the judiciary substitute its own judgment for that of the democratically elected and politically accountable legislature is avoided.

V. CONCLUSION

The EAA was passed to ensure that students be afforded their constitutional right to engage in religious speech on equal terms with other student speech.³³² A denial of equal access denies students rights which are protected, not only by the EAA, but by the First Amendment itself.³³³ If state statutes or state constitutional provisions are permitted to override the requirements of the EAA, the Act essentially becomes meaningless.³³⁴ Such an intent cannot logically be ascribed to Congress. An amendment to the Act would

329. See *supra* part IV.B.2 (discussing in detail how congressional intent to preempt state law can be inferred).

330. STARR ET AL., *supra* note 279, at 40.

331. *Id.* at 47.

332. See *supra* note 61-63 and accompanying text.

333. See *supra* part IV.A.

334. See *supra* notes 322-28 and accompanying text.

resolve any confusion regarding the Act's preemptive effect, preventing both the frustration of congressional goals and the denial of constitutional rights.

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